

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL RAKUSIN	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and	:	DTA NOS. 817336
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	AND 817337
Period September 1, 1991 through November 30, 1995.	:	

In the Matter of the Petition	:
of	:
MICHAEL RAKUSIN	:
for Redetermination of a Deficiency or for Refund of	:
Personal Income Tax under Article 22 of the Tax Law for	:
the Period December 1, 1990 through December 31, 1990.	:

Petitioner, Michael Rakusin, 2776 East 66th Street, Brooklyn, New York 11234, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1991 through November 30, 1995, and a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period December 1, 1990 through December 31, 1990.

The Division of Taxation appearing by Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition with the Division of Tax

Appeals within 90 days of the issuance of the notices of determination and the notices of estimated determination. The Division of Taxation submitted a Notice of Motion and the affidavit of Michelle M. Helm, Esq., with attachments, including the affidavits of Geraldine Mahon, James Baisley and Terrence S. Atwater, in support of its motion. Petitioner's response was submitted on June 30, 2000, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, and the affidavits and documents submitted in support of the motion of the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has shown entitlement to a determination granting summary determination in its favor on the ground that the material facts presented show petitioner's request for a conciliation conference with the Bureau of Conciliation and Medication Services was untimely.

FINDINGS OF FACT

1. The Division of Taxation ("Division") purportedly issued to petitioner, Michael Rakusin, six notices of determination dated June 11, 1996, identified by Assessment ID Nos. L012192151, L01292152, L012192153, L012192154, L012192155, L012192156, and four notices of estimated determination L012192157, L012192158, L0121925159 and L012192160, bearing certified mail control numbers P 911 172 910 through P 911 172 919, respectively. Such notices asserted additional sales and use taxes due for the period September 1, 1991 through November 30, 1995, as follows:

Assessment No.	Tax	Interest	Penalty	Total Amount Due
L012192151	\$ 5,864.60	\$ 343.17	\$ 879.66	\$ 7,087.43
L012192152	8,651.61	784.33	1,577.24	10,993.18
L012192153	10,140.65	1,258.90	2,129.46	13,529.01
L012192154	10,071.27	1,597.90	2,417.06	14,086.23
L012192155	12,063.81	3,226.39	3,618.98	18,909.18
L012192156	8,285.89	2,863.47	2,485.58	13,634.94
L012192157	18,135.66	10,213.61	5,440.56	33,789.83
L012192158	18,135.66	11,084.03	5,440.56	34,660.25
L012192159	18,135.66	11,981.18	5,440.56	35,557.40
L012192160	18,135.66	12,693.99	5,440.56	*33,055.18

*Reflects assessment payments or credits in the amount of \$3,215.03.

The notices of determination and notices of estimated determination are each addressed to petitioner at “2776 E 66 St, Brooklyn, NY 11234-6807” and have been made a part of the record herein. All of the notices refer to petitioner’s alleged liability as an officer or responsible person of Stern & Wynch. The six notices of determination state that the notices may be challenged by filing a request for a conciliation conference or a petition for a tax appeals hearing by “09/09/96.” The notices then state, in part, “[i]f we do not receive a response to this notice by 09/09/96: This notice will become finally and irrevocably fixed and subject to collection action.”

The four notices of estimated determination state that the tax has been estimated in accordance with Tax Law § 1138 and may be challenged through a hearing process by filing a request for a conciliation conference or a petition for a tax appeals hearing by “09/09/96.”

2. The Division purportedly issued to petitioner, Michael Rakusin, a Notice of Estimated Deficiency, Assessment ID No. L012192921, bearing certified mail control number P 911 172 920, dated June 11, 1996. Such notice asserted a penalty due for the period December 1, 1990

through December 31, 1990, in the amount of \$3,555.00. The penalty is equal in amount to the tax not paid by Stern & Wynch, of which petitioner is alleged to be an officer or responsible person. The Notice of Estimated Deficiency is addressed to petitioner at "2776 E 66 St, Brooklyn, NY 11234-6807," and has been made a part of the record herein. The notice states that the estimated assessment on which the penalty is based was issued because a required tax return was not filed by Stern & Wynch.

3. Concerning the notices assessing sales and use tax and personal income tax, two conciliation orders dismissing request, dated June 25, 1999, were issued by the Bureau of Conciliation and Mediation Services ("BCMS"), bearing the following explanation:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on June 11, 1996, but the request was not mailed until May 18, 1999, or in excess of 90 days, the request is late filed.

Petitioner filed two petitions with the Division of Tax Appeals in protest of the orders on September 29, 1999.

4. The Division submitted the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing; James Baisley, Chief Mail Processing Clerk of the Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office; and Terrence Atwater, Director in the Personal Income Tax Returns Processing Bureau, whose duties include overseeing the analysis and testing of computer systems which process tax return information. These affidavits describe the general procedures for the preparation and mailing of the notices in issue, and describe how such procedures were followed in this case.

5. The general process for issuing and mailing notices of determination and deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Presort Qualified Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding statutory notices. The CMR is printed approximately ten days prior to mailing to allow time for review and processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on each. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the

post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate the total number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

6. In support of its position that the procedures outlined in Finding of Fact "5" were followed in this case, the Division has also submitted a copy of pages 1, 10, 20, 30, 40, 46, 47, 50, 60, 70, 80, 90, 100, 110, 120, 130, and 134 of the CMR listing the 10 sales and use tax notices at issue in this matter. The CMR consists of 134 pages with 11 entries on each page, with the exception of page 134 which bears 5 entries. It shows a printed date of "6/1/96" on each of the 36 pages. On page one the printed date has a line through it and above it is handwritten the date of "6-11-96." There is a consecutive listing of 1,468 certified control numbers beginning with P 911 172 405 and ending with P 911 173 872. There is a Postal Service postmark of June 11, 1996 on pages 1, 47, and 134 of the CMR. A Postal Service postmark without a clear date appears on page 46. On the last page next to "TOTAL PIECES AND AMOUNTS LISTED" appears the printed number 1,468, which is circled. There is no amount next to "TOTAL PIECES RECEIVED AT POST OFFICE." There is a signature under the number 1,468 on the last page.

Petitioner's name is listed on page 46 for one notice and page 47 of the CMR for the remaining nine notices. The certified numbers listed for the notices sent to petitioner are P 911 172 910 through P 911 172 919, which match the certified numbers shown at the top of the ten notices issued to petitioner. The notice numbers listed on the CMR for petitioner's notices are consecutively L 012192151 through L 012192160, which match the numbers appearing on the notices.¹ The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner's notices.

The same CMR is submitted into evidence as proof of mailing of Notice of Estimated Deficiency No. L012192921 under certified control number P 911 172 920. Petitioner's name is listed on page 47 of the CMR. The certified number listed for the notice sent to petitioner matches the certified number shown at the top of the notice issued to petitioner. The notice number listed on the CMR for petitioner's notice (L012192921) matches the number appearing on the notice. The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner's notice.

7. Terrence Atwater is the Director in the Personal Income Tax Returns Processing Bureau in the New York State Department of Taxation and Finance and has been employed by the Department for seven years. As part of his regular duties, Mr. Atwater oversees the analysis and testing of computer systems which process tax return information. These systems store information derived from various sources and generate printed documents which are sent to taxpayers as well as printouts of purged information.

¹ The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

After the taxpayer's information is captured from the taxpayer's return or application for an extension to file a return onto the Returns Processing Database, it is stored in a record format. The taxpayer's address represented on the printout is the information used to process the taxpayer's return or application for an extension to file. Based on his review of the computer printout of petitioner's Application for Automatic Extension of Time to File for Individuals for the year 1995, Mr. Atwater could determine that petitioner's address as listed on such application was 2776 E. 66th St, Brooklyn, NY 11234-6807.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioner submitted an affidavit in opposition to the Division's motion stating, in pertinent part, that he does not dispute the *mailing* of the notices on June 11, 1996, but rather claims to never have received them, since he did not reside at 2776 E. 66th Street, Brooklyn, New York after February 1995. He asserts that he never received the ten notices assessing sales and use tax, and this should be viewed as rebutting the presumption of receipt. Concerning the income tax estimated notice of deficiency, petitioner maintains that the Division failed to show any due diligence to determine whether the address to which the notices were mailed was petitioner's last known address. As a result, he argues that the Division's motion should be denied and petitioner should be granted the right to have the merits of his case heard.

9. The Division simply argues that petitioner did not meet his burden of proof to show that his protest of the notices of determination and the notice of deficiency was timely.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. It is the contention of the Division that it is entitled to summary determination in its favor because petitioner failed to file a timely request for a conciliation conference or petition for a tax appeals hearing. The laws addressing the issuance and mailing of notices of determination and deficiency and the procedures to timely protest the same follow.

Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1), as in effect during the period in issue, such determination “shall finally and irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice.² As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*) However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division. The Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar*

² Section 1138(a)(1), as amended by Laws of 1996 (ch 267), deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997, as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect (*see* McKinney’s Cons Law of NY, Book 1, Statutes § 51[b]). Since the assessments in this case pertain to the time period September 1, 1991 to November 30, 1995, the amendment to Tax Law § 1138(a)(1) does not apply.

TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; **Matter of Katz**, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered into the custody of the United States Postal Service (**Matter of Air Flex Custom Furniture**, Tax Appeals Tribunal, November 25, 1992). Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz, supra*).

The required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon, Mr. Baisley and Mr. Atwater in support of its position that the notices of determination, estimated determination and estimated deficiency were issued to petitioner on June 11, 1996, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing such notices (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notices were issued, the assessment number of the notices and the certified control number assigned to the notices.

Second, the Division established that the general issuance procedure was followed on June 11, 1996 in the generation and mailing of petitioner’s notices dated that day. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as June 11, 1996 (*see, Matter of Auto Parts Center*,

Tax Appeals Tribunal, February 9, 1995). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purpose of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient.

Finally, it is noted that the figure "1468" on the last page of the June 11, 1996 CMR, signifying the total number of pieces of mail involved, has been circled and a Postal Service employee has signed in the vicinity of the figure. As in *Matter of Roland (supra)*, the postal employee circled this figure to indicate the number of pieces of mail received by the USPS on June 11, 1996. In addition, and unlike the situation in *Roland*, the affiant, Mr. Baisley, states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has established that the notices of determination, estimated determination and estimated deficiency were mailed on June 11, 1996.

Petitioner does not challenge the method of mailing of the eleven notices dated June 11, 1996. However, petitioner disputes his receipt of such notices. Although petitioner attempted to rebut the presumption that the notices assessing sales and use tax were delivered to him by his statement of nonreceipt, the proof of mailing and delivery submitted by the Division

proves that proper mailing procedures were in fact followed in this case. Petitioner's statement alone is not sufficient to rebut the established presumption of receipt.

Concerning the notice assessing personal income tax, petitioner argues that the Division failed to show it exercised any due diligence to determine whether the address to which the notice was sent (2776 E. 66th Street, Brooklyn, New York) was his last known address. However, the Division has established that it mailed the notice to petitioner on June 11, 1996 at his last known address, which was acquired from Form IT-370, a personal income tax extension filed in the name of petitioner and his (then) spouse for tax year 1995. The Division's documents show a filing date for Form IT-370 of April 15, 1996. Although petitioner claims not to have filed such extension, and asserts he had not been living in his former marital residence (2776 E. 66th Street, Brooklyn, New York) since February 1995, the Division acted properly in using the address it was provided from the extension. The extension appears as though it was filed jointly, and clearly the Division had no reason to question the representation that the Brooklyn address was petitioner's last known address.

Accordingly, petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of June 11, 1996, or no later than September 9, 1996. Since the request was not made until May 18, 1999, it is time barred.

D. The only issue of fact raised was the nonreceipt of the notices of determination, estimated determination and estimated deficiency by petitioner. Since the Division has sufficiently refuted such nonreceipt by its proof, and petitioner has submitted nothing further, the issue is found to be irrelevant as a matter of law. Such result leaves this matter a proper one for summary determination.

E. The Division of Taxation's motion for summary determination is granted as to Notices of Determination L012192151, L01292152, L012192153, L012192154, L012192155, and L012192156, Notices of Estimated Determination L012192157, L012192158, L0121925159 and L012192160, and Notice of Estimated Deficiency L012192921, all of which are dated June 11, 1996.

F. Accordingly, the petitions of Michael Rakusin are hereby dismissed.

DATED: Troy, New York
September 21, 2000

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE